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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE E. WESBEY III, Plaintiff and Appellant, v. TOLL CA IV, L.P., et al., Defendants and Respondents.	D053476 (Super. Ct. No. GIN047945)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

Plaintiff and appellant George E. Wesbey III (plaintiff) appeals from the judgment entered in favor of defendants Toll CA IV, L.P., Toll Bros., Inc. and Toll CA GP Corp. (Toll or Toll Entities), the developer of his residential property, and in favor of defendant Encinitas Ranch Community Association, the homeowners' association at the development, Encinitas Ranch (ERCA or the HOA), on various causes of action. During the development process, an access easement to plaintiff's property was created in a

manner that he alleges was violative of two particular schemes of land use law, thereby entitling him to rescission of the contract for the purchase of his home and damages. (Subdivided Lands Act (Bus. & Prof. Code, § 11000, et seq.; the SLA) and the Subdivision Map Act (Gov. Code, § 66410 et seq.; the SMA)).

Additionally, plaintiff alleges that the same actions by both Toll and the HOA breached the applicable conditions, covenants and restrictions for the Encinitas Ranch development (the CC&Rs), and further constituted unlawful business acts, in violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.). Plaintiff alleges he, as a homeowner and resident within the development created by defendants, was damaged when Toll failed to create the access easement by conveying, in the manner originally planned, a common area easement lot to the HOA. Toll changed the plan, by retaining ownership for itself, and plaintiff alleges this was done without properly amending the subdivision map or making appropriate disclosures to the state Department of Real Estate (DRE) as required by statute.[1]

After court trial on plaintiff's second amended complaint (SAC), conducted on stipulated facts and admissibility of the relevant documents, the trial court denied all his statutory and common law claims. The court issued declaratory relief concerning the appropriate scope and application of the particular document complained of, a "special

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[1] Both plaintiff and his wife were parties to the contract of sale of the residence, but Mrs. Wesbey has quitclaimed her interest to Mr. Wesbey. He pursues this appeal in propria persona.

disclosure" about the access easement, that was prepared by Toll and entered into by plaintiff and owners of two neighboring lots.

In his appeal, plaintiff contends the trial court misinterpreted the requirements of the SLA and SMA, and therefore erred when it determined that those statutory schemes, the CC&Rs, and/or the UCL were not violated by the methods used by Toll and the HOA to process and disclose the access easement. On the stipulated undisputed facts of this case, and on de novo review of the legal issues presented, we find no error in the trial court's conclusions that no material changes were made to the planning documents that would have required further disclosure, under the applicable statutory and regulatory requirements. Plaintiff's related theories also fail. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Transactions and Participants

The stipulated undisputed facts presented to the trial court show that in November 2003, plaintiff entered into a contract to purchase a residence that was developed and owned by the Toll Entities, located on Lot 58 in Encinitas Ranch. This was one of 70 lots in the South Mesa planning area of the 500-lot development. The property is subject to a 1999 declaration of CC&Rs, containing provisions for common areas, such as access easements, to be owned by the HOA. Between 2001-2002, subdivision mapping was submitted to the city of Encinitas (the City).

Before escrow closed on plaintiff's residence on August 9, 2004, many transactions and planning events occurred about access and landscaping issues concerning it, between Toll, the HOA, City planners, and the DRE. Some of the

documentation was inconsistent, giving rise to problems in connection with the designation of ownership of an access or driveway lot (Lot 79, or "the street lot"). The street lot is in the shape of a long driveway, with landscaping along the edges. It is adjacent to plaintiff's Lot 58, and provides access to Lot 58 as well as two adjoining lots, 59 and 60. Lot 59 was ultimately purchased by Mr. and Mrs. Echols (named as defendants but not parties to this appeal).[2] Lot 60's owners are not involved in this action.

B. Documentation

1. Tentative/Final Maps and Irrevocable Escrow Instructions

In 2001, Toll prepared its original tentative map, which included covenants with the City, in consideration of the approval of the tentative map, to comply with the terms and conditions of the permit and other stated easements (for golf balls, recreational easements, etc.). The CC&Rs provided for HOA ownership of common areas in the development, such as access easements, to be designated by supplemental declarations of restrictions. Under condition SCZR of the tentative map, the HOA would own Lot 79 as a common area.

The tentative map was approved and recorded by the City in February 2002 (final map). Both that map, the 2001 DRE "notice of intention" and worksheets, and the DRE final report showed that Lots 72 and 79 would be common areas for the development.

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[2] The Echols eventually cross-complained against plaintiff for intentional interference with contractual relations, but they were unsuccessful. They did not appeal.

In December 2001, Toll prepared irrevocable escrow instructions that showed the same common area designation for Lots 79 and 72. Shortly after the final map was approved in February, in March 2002, Toll prepared a supplementary declaration (the 2002 supplementary declaration). In one of its exhibits, this 2002 supplementary declaration identified Lot 79 as a community common area, but in another exhibit, as a slope maintenance area/common maintenance area. The exhibits were inconclusive about whether the HOA was supposed to own the street lot, or merely to maintain it.

2. Driveway Access Easement/ Special Disclosure Process

Meanwhile, irrigation problems had arisen at the site of these particular lots, because Lot 79 had no water access, and the City did not want to allow the existing pavement to be cut to install pipes. The Toll Entities proposed in 2003 that they would transfer Lot 79 to the ultimate owners of Lot 59, who would pay for irrigation, while the transfer would also preserve the access rights to Lots 58 and 60. The HOA's board discussed the matter, and Toll drew up new maps outlining this plan and attached them to a document entitled "Special Disclosure Concerning Lots 58, 59, 60 and 79" (the 2003 special disclosure). Plaintiff signed the 2003 special disclosure in November 2003, along with the sales contract. [3]

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[3] The 2003 special disclosure states that it is intended to clarify the manner in which certain lots in the development shall share a driveway, attaching a map of Lots 58, 59, 60, and 79. It outlines the plan to convey fee title to Lot 79 to the owners of Lot 59, the Echols, for purposes of imposing maintenance and irrigation responsibilities, while preserving access rights for the owners of the other lots. Toll was to prepare a special declaration to implement the terms of the special disclosure.

During the processing of plaintiff's transaction, Toll's representatives told the escrow holder to pull the common area grant deed for Lots 79 and 72, consistent with the 2003 special disclosure terms. The Lot 72 deed showing transfer to the HOA was recorded in October 2004, but the previous Lot 79 reference in that grant deed (as common area) had been whited out. This was done around the same time that escrow closed on the Echols lot, no. 59 (June 2004). With the approval of HOA board members, Toll was still planning for the owners of Lot 59 to obtain title to Lot 79, instead of the HOA.

Previously, in May 2004, Toll had begun to close escrow on sales of residential lots in the development, but it did not notify the DRE nor amend its subdivision map to show any changes about ownership or title of Lot 79. Toll's representatives were not requested by City or state planning authorities to make such changes, and Toll's attorneys told them it was not necessary because of the nature of the access easement that was preserved. It is not disputed that at the time of trial (Jan.-Feb. 2008), Toll continued to own Lot 79, which shows recorded easements for access for the benefit of Lots 58, 59 and 60.

On March 23, 2004, Toll representatives prepared a special declaration of restrictions and reservation of easements regarding driveway access for Lots 58, 59, 60, and 79 (the 2004 special declaration), which incorporated the 2003 special disclosure terms regarding the street lot. A list of lot transfer dates submitted to the DRE did not include any transfer of Lot 79. The record suggests that the 2004 special declaration was

not recorded until some time after plaintiff filed his complaint in October 2005. According to Toll representatives, they put a hold on it because of this litigation.

Plaintiff took title to his property in August 2004, but apparently found problems with driveway access and parking on Lot 79. In October 2004, plaintiff went to an HOA board meeting to object to access problems. In 2005, the HOA's attorney wrote a letter to Toll stating that the HOA did not want to receive fee simple title to Lot 79 and did not want to assume responsibility for it. The disputes continued, and Toll asked plaintiff and the owners of Lots 59 and 60 to execute an additional grant of driveway easement. Plaintiff refused, because he believed it imposed terms beyond what was called for in the 2003 special disclosure. [4]

C. Plaintiff's Action Filed in 2005; Phase 1 Jury Trial Conducted

Plaintiff's SAC contained 13 causes of action in numerous counts, and included several theories that are not relevant to this appeal. By stipulation, the claims for fraud, concealment and negligent misrepresentation against Toll were resolved by a jury (favorably to Toll), as were the negligence and breach of fiduciary duty claims against the HOA (in its favor). The jury's verdict in favor of defendants on all those counts is not a subject of this appeal. The parties agreed that the court should proceed with a bench trial on the remaining issues.

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4 In the statement of decision, the court resolved additional issues that are not disputed in this appeal. However, for background, we note that the trial court decided plaintiff was not required to execute an additional grant of driveway easement , which imposed terms beyond what was called for in the special disclosure. The trial court also made findings that there were no defects in the drainage system on Lot 58 that Toll should be required to correct.

In the SAC against Toll, plaintiff sought rescission, damages and declaratory relief. (Civ. Code, §§ 1689, 1692.) His theory was that the 2003 special disclosure and related planning and transfer activities about Lot 79 violated both the SLA and the SMA, so his contract was based on unlawful transactions and was therefore voidable at his option. (Gov. Code, § 66499.32.) He also sought a determination that these alleged violations of the SLA and SMA by both Toll and the HOA constituted breaches of the CC&Rs provisions that required timely transfer of common areas from the developer to the HOA. Finally, he claimed that these underlying "unlawful" activities amounted to violations of the UCL (Bus. & Prof. Code, § 17200).

D. Phase 2 of Trial; Statement of Decision

At the start of court trial in January 2008, plaintiff's remaining claims for rescission and damages were based on statutory grounds, including the SMA (counts 1.3, 2.2, 3.1), the SLA (counts 1.2, 2.1), and the UCL (count 11.1). Breaches of the CC&Rs were pled in counts 5.1 and 5.2. Count 12 sought declaratory relief regarding the status of Lot 79.

Before trial, the parties stipulated to numerous undisputed facts about the history of the transactions, and to the admissibility of the relevant planning documents. As particularly relevant here, it was stipulated that at the time of trial, Toll continued to own the street lot. The 2003 special disclosure work has never been followed up with a transfer of title from Toll to the Lot 59 owners, although an access easement across Lot 79 was eventually recorded. (See fn. 3.)

The trial court heard extensive testimony from the parties and numerous representatives of the planning agencies, about their understandings of the transactions and the 2003 special disclosure in particular. DRE witnesses (Gilmore, Schick and Katzman) generally testified that in some instances, changes were made by other developers and associations about designations of common areas, including map conditions, without amendment of the underlying planning documents, if the changes were not considered to be material. In this transaction, the HOA was concerned about taking title to the street lot because of cost considerations on the need for irrigation and maintenance.

A witness for the City (Langager) testified that in some cases, changes could be made to map conditions such as driveway easements through boundary adjustments, without amendment of the planning documents. Toll witnesses (Roberts, Raddatz and Atty. Inouye) testified that they did not believe the driveway access condition needed to be amended because no changes had been made to access rights. Attorney Inouye stated that he had notified DRE representatives about the 2003 special disclosure documents, which he prepared and considered to be adequate. However, he acknowledged that there were some inconsistencies between the escrow instructions, the public reports, and the 2003 special disclosure regarding the status of title for Lot 79.

At the close of the evidence, the trial court issued tentative and final statements of decision. As summarized in the statement of decision, the 2003 special disclosure document had been read, understood and executed by plaintiff, but he continued to contend "that the failure to obtain the [DRE's] approval and/or that of the City of

Encinitas for this change entitles [him] to rescind the purchase and to recover monetary damages from the Toll Entities."

The court concluded that plaintiff's contentions were not supported by the statutory and common law rights asserted. Regarding the 2003 special disclosure, the court ruled that since it had been read, understood and executed by plaintiff, this obviated any arguments that appropriate and required disclosures of the relevant and material facts had not been made. The court reasoned, "To the extent that statutory violations require a finding that the change in ownership of Lot 79 was material, these claims must fail. *The regulations of the Department of Real Estate limits such changes to additions as opposed to deletions from the common areas, [Cal. Code Regs., tit. 10, § 2800, subd. (g)]*. And to the extent such violations require findings of fraud, the Court concurs with the jury that the plaintiffs did not meet their burden of proof." (Italics added.)

The statement of decision then identified "a more fundamental problem with the plaintiffs' position. The statutory grounds, including the Subdivision Map Act, the Subdivided Lands Act and the Business and Professions Act, all are designed to protect uninformed consumers from illegal, fraudulent or simply unfair practice. In addition to the absence of evidence to support such findings, the plaintiffs' case lacks the prerequisite to all of these theories, to wit: being uninformed. The Special Disclosure's terms were clear and were acknowledged as having been understood by the plaintiffs before they entered into the escrow. The Toll Entities justifiably relied on its execution, and the plaintiffs are estopped from challenging the implementation of its terms.

"While the concepts of estoppel and waiver are not necessarily interchangeable, they each appear to be applicable to the circumstances of this case. [¶] It is this same principle that limits the Toll Entities in their efforts to impose conditions that exceed the wording of the Special Disclosure."

The court accordingly issued judgment incorporating the above findings and including declarations, as pertinent here: "1. The Special Disclosure was valid and enforceable. [¶] 2. The rights and obligations of the parties to the Special Disclosure are to have a recordable document prepared which implements its terms and no more."[5]

E. Appeal

Judgment was entered in favor of Toll and the HOA, and plaintiff appeals. We granted an application to file an amicus curiae brief on behalf of plaintiff, from the California Association of Realtors, addressing the proper interpretation of the DRE's regulation, California Code of Regulations, title 10, section 2800, subdivision (g), with respect to defining "material changes" to the common areas, as additions and/or deletions. In addition, we issued an order allowing answers to the amicus curiae briefing. Both plaintiff and Toll have filed answers to the brief. (See pt. II, *post.*)

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5 With respect to any claim by plaintiff that he was owed fiduciary obligations by the Toll Entities, the court found no legal basis for the imposition of such a duty, nor any factual support of any such breach. The court also explained that it "assumed that the jury verdict concluded the case against the HOA; however to the extent that it did not, there is no factual and legal basis for the imposition of any civil liability." Those fiduciary issues are not pursued on appeal, nor has plaintiff directly discussed the declaratory relief claims. The validity, scope and effect of the 2003 special disclosure are issues that are subsumed in the other arguments made on appeal, and there is no need to discuss declaratory relief separately.

DISCUSSION

All of plaintiff's arguments on appeal are based on his theory that the trial court, presented with stipulated facts, misinterpreted the requirements of the SLA and SMA for purposes of analyzing these transactions. Specifically, plaintiff attacks the trial court's conclusions that there were no *material* changes to the setup of the subdivision, that had to be further disclosed in the planning documents. (Bus. & Prof. Code, § 11012.) With regard to the SMA claims, plaintiff argues the trial court should have concluded that under these circumstances, Toll was required to prepare and record amended subdivision maps. (Gov. Code, § 66469.)

To address these statutory arguments, as well as the arguments based on the CC&Rs, we first set out general standards of review, and then focus upon the particular terminology relied upon by plaintiff, as applied to these undisputed facts.

I

SCOPE OF REVIEW

A. Applicable Standards

"Although a trial court's findings of fact bind a reviewing court if substantial evidence supports those findings, the trial court's legal conclusions are not binding on appeal. [Citation.] Legal questions must be reviewed de novo. [Citation.]" (*PJNR, Inc., v. Department of Real Estate* (1991) 230 Cal.App.3d 1176, 1183 (*PJNR*).) In this case, the legal questions required the application of statutory standards to the undisputed facts. Determining the meaning of a statutory standard resolves questions of law. (*People ex rel Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) "The soundness of the

resolution of such a question is examined de novo. [Citation.]" (*Ibid.; Le Gault v. Erickson* (1999) 70 Cal.App.4th 369, 372 (*Le Gault*).)

When a court ascertains the legislative intent of a particular provision, " 'the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation] . . . .' " (*California Correctional Peace Officers Assn. v. State Personnel Bd*. (1995) 10 Cal.4th 1133, 1143 (*Cal. Correctional Peace Officers*), citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910 (*Morris*), criticized on another point in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 987, fn. 8.)

A statutory requirement is deemed to be "mandatory" if, when that requirement was not observed while a certain decision was effected in its absence, that decision must be invalidated due to the absence of the statutory protections. (*Morris, supra*, 18 Cal.3d 901, 908; *Cal. Correctional Peace Officers, supra,* 10 Cal.4th 1133, 1145.) On the other hand, the nonobservance of only "directory" language in a statute will not result in the need to invalidate the particular decision that was made in its absence. (*Morris, supra,* at p. 908.)

"In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore a practical construction is preferred. [Citation.]" (*Cal. Correctional Peace Officers, supra,* 10 Cal.4th 1133, 1147.) This basic concept is also explained in

People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 305 (*Lungren*), as follows: " ' "[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." [Citation.] . . . Stated differently, "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." [Citation.] A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose." ' [Citation.]"

The trial court's conclusions that there were no *material* changes to the setup of the subdivision, for purposes of requirements of further disclosures or, in their absence, plaintiff's rescission request, involved analysis of both factual and legal issues. The parties disagree on the applicable standards of review. The most appropriate approach is the one laid out in *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791 (*Ghirardo*), for deciding mixed questions of fact and law: A court first establishes the historical facts, and selects the applicable law. " 'The third is the application of law to the facts. All three trial court determinations are subject to appellate review. Questions of fact are reviewed by giving deference to the trial court's decision. Questions of law are reviewed under a nondeferential standard, affording plenary review. [Citation.] However, as to the third step, the application of law to fact, difficulty is encountered and views as to the correct approach are mixed. . . . [P] " '[If] the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal

principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." ' [Citations.]" (*Id.* at pp. 800-801.)

This case falls into the latter category, so that the legal characteristics of the transactions require an application of law to the facts. It is then properly a question of law subject to independent review. (*Ghirardo, supra,* 8 Cal.4th at p. 801.) When seeking to ascertain legislative intent, we give due regard to " 'the object to be achieved and the evil to be prevented by the legislation.' [Citation.]" (*City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 306 (*Long Beach*).) The issues before us are whether the trial court correctly determined that plaintiff's claims do not fall within the scope of coverage of the statutory schemes he relied upon.

B. Record Status

Before turning to the legal questions about the meaning of the SLA and SMA provisions, as applied to these stipulated facts, we first emphasize the narrowness of the questions presented. The stipulated facts established Toll's continued ownership of the street lot, and grant of easements, as of the time of trial. "[G]enerally applicable rules of appellate procedure" do not allow consideration of postjudgment evidence of changed circumstances, if any. (*In re Zeth S.* (2003) 31 Cal.4th 396, 413.) We review the record as we find it, to apply the text of these statutory provisions to this set of facts.

However, plaintiff seems to argue that Lot 79 had been converted into a residential lot, as of the time of trial. The stipulated facts were that Toll continued to own the street

lot, and it dedicated access easements across it, in favor of Lot 58 and others. This record does not show that the Echols ever received title to Lot 79, nor that Lot 79's current status allows any other use than an access easement for the specified lots. Thus, plaintiff has no basis in the record to demonstrate that common area character was ever definitively established or deleted regarding Lot 79, or to show he was damaged in particular in his own transaction, in light of the 2003 special disclosure he signed. Nevertheless, the factual question of the manner of holding title, alone, does not seem to answer the issue of whether any "material changes" were made in the setup of the subdivision, by way of the 2003 special disclosure, as we will discuss in more detail in part II, *post*.

We also seek to clarify that plaintiff's election to rescind the subject contract, unilaterally, was not immediately effective, as he seems to believe. At pages 39 to 41 of the opening brief, he argues that he had the sole discretion and election to decide to rescind his real property sales contract, pursuant to SLA (Bus. & Prof. Code, § 11012) and SMA provisions (Gov. Code, § 66499.32), combined with the authority of Civil Code section 1689 et seq.

The authors of 1 Witkin, Summary of California Law (10th ed. 2005) Contracts, section 936, pages 1030 to 1031, explain that a unilateral effort to rescind a contract is not implemented unless the procedures set forth in Civil Code 1692 are followed:

" 'When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) bringing an action to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission or for any other relief to which he may be entitled under the circumstances or (b)

asserting such rescission by way of defense or cross-complaint.' [Citations.]" In such an action, either damages and/or rescission may be awarded, but that is a matter for the court to decide. (1 Witkin, Summary of Cal. Law, *supra,* Contracts, § 936, pp. 1030-1031.)

Here, plaintiff is seeking rescission under Civil Code section 1689, subdivisions (b)(5) and (6), by claiming: (5) " 'the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault' " and (6) " '[If] the public interest will be prejudiced by permitting the contract to stand.' " (1 Witkin, Summary of Cal. Law, *supra,* § 935, p. 1030.) In analyzing whether the record supports his contentions, that some kind of "material" change took place, the purposes of the statutory schemes must be evaluated, within the applicable standards of review.

II

SLA ISSUES

A. Statutory and Regulatory Scheme

Plaintiff challenges the manner in which Toll attempted to comply with the reporting requirements contained in the SLA. (Bus. & Prof. Code, § 11000 et seq.) The objective of the SLA (Act) "is to prevent fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses. [Citation.] To this end the Act establishes a comprehensive and elaborate statutory scheme to regulate such real estate transactions. (See [Bus. & Prof. Code,] § 11000 et seq.) The Act gives broad enforcement authority to the Real Estate Commissioner, including authority to adopt necessary rules and regulations (see Cal. Code Regs., tit. 10, § 2700 et seq.) and to issue orders, permits,

decisions, demands or requirements to carry out the purposes of the Act. ([Bus. & Prof. Code,] § 11001.)" (*PJNR, supra*, 230 Cal.App.3d 1176, 1183.)

As the developer, Toll was required to file "an application for a public report with detailed information regarding the nature of the subdivided lands and the proposed offering. ([Bus. & Prof. Code,] § 11010.) The commissioner issues a public report if the information is substantially complete. ([Bus. & Prof. Code,] § 11010.2.) Once the commissioner has issued a public report, the subdivider must distribute a copy of the report to every prospective purchaser. ([Bus. & Prof. Code,] §§ 11027, 11018.1.)" (*PJNR, supra*, 230 Cal.App.3d 1176, 1184.)

Under Business and Professions Code section 11012, "[i]t is unlawful for the owner, his agent, or subdivider, of the project, after it is submitted to the Department of Real Estate, *to materially change the setup* of such offering *without first notifying* the Department of Real Estate in writing of such intended change. This section only applies to those changes of which the owner, his agent, or subdivider has knowledge or constructive knowledge." (Italics added.)

California Code of Regulations, title 10, section 2800, implements Business and Professions Code section 11012, by defining when notification of a "material" change is required. As pertinent here, an owner of a subdivision that is the subject of an outstanding public report "shall immediately report in writing to the Real Estate Commissioner relevant details concerning any material change in the subdivision itself . . . . *A material change in the subdivision or in the offering shall include, but shall not be limited to the following*: [¶] (a) The sale, conveyance, including a transfer of title in

trust, or the granting of an option to another to acquire, five or more subdivision interests in a subdivision . . . . [¶] . . . [¶] (g) *Addition of common areas* or common facilities for the use and enjoyment of owners in the subdivision *which were not contemplated at the time of issuance of the current public report for the subdivision*." (Cal. Code Regs., tit. 10, § 2800; italics added.)

B. "Materially Changing" Terminology; Contentions

As outlined above, it is appropriate to examine the "materiality" issue as a mixed question of fact and law, regarding the SLA and SMA terminology as applied to the undisputed facts presented. (See *Ghirardo, supra,* 8 Cal.4th 791, 799-801.) We also apply the rule that it is the correctness of the judgment we decide, regardless of the reasoning of the trial court. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 (*D'Amico*).) That approach gives some degree of deference to the statement of decision's factual and legal findings, as they will show the basis for the ruling of the trial court. (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) "[A]ny conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*Ibid*.)

Although plaintiff received disclosures of the different treatments of Lot 79 during the relevant time periods, he argues that the HOA and the developer could not alter the statutory standards by agreement. (See *Barrett v. Hammer Builders, Inc.* (1961) 195 Cal.App.2d 305, 310 [holding that the "legislative purpose of protecting the public would not be effectuated by permitting a subdivider to circumvent the legislative mandate"];

Bodily v. Parkmont Village Green Home Owners Assn., Inc. (1980) 104 Cal.App.3d 348, 355; *PJNR, supra,* 230 Cal.App.3d 1176, 1185.)

In response, Toll admits that "at worst, the issue of whether the proposed plan to convey Lot 79 to the owners of Lot 59 rather than to the HOA constitutes a material change is a 'gray area.' " That is, there were some inconsistencies in the documents, but the knowledgeable witnesses gave differing testimony about whether this amounted to a "material" versus an insignificant change, and about whether any further disclosures were required or advisable.

More specifically, plaintiff argues that under Business and Professions Code section 11012 and its implementing regulation, California Code of Regulations, title 10, section 2800, the deletion of a common area from a subdivision may amount to a material change in its setup, even though that situation is not spelled out by statute.[6] Toll says that to the contrary, the regulation should be read as written, to exclude such a reading.

We have received amicus curiae briefing to the effect that we should make only a narrow reading of the trial court's ruling, to avoid any statutory construction that would disallow the deletion of a common area from falling within the definition of a "material change," as found in the regulation and statute. (Cal. Code Regs., tit. 10, § 2800; Bus. & Prof. Code, § 11012.) The parties seem to assume that this will be a precedential decision, although this court has the ability to decide whether it meets publishable

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6 California Code of Regulations, title 10, section 2800 enumerates certain types of changes that are considered to be "material" within the meaning of Business and Professions Code section 11012. However, the list provided is stated to be nonexclusive, as quoted above.

standards. (Cal. Rules of Court, rule 8.1105.) We avoid the rendering of advisory opinions, and the trial court's reasoning on materiality of a change, regarding addition and deletion, is not an essential consideration about whether this ruling should be upheld. (*D'Amico, supra,* 11 Cal.3d at p. 19.)

Even assuming that a complete analysis of the statutory term, "*to materially change the setup"* of a subdivision, is squarely required on this record, the term cannot be read in a vacuum. The dictionary definition in the Oxford English Dictionary, as relevant in this context, outlines "materially" as follows: "4. To a material or important extent; significantly, substantially, considerably." (Oxford English Dictionary Online (Draft rev. Mar. 2009) (as of Jan. 13, 2010).)

In 55A West's California Digest 2d (2005) Words and Phrases, pages 431 to 449, there are dozens of examples of the use of the terms material, material change or alteration, material disclosure, etc. These are taken from various bodies of law, including evidence, criminal law, securities law, insurance law, taxation, immigration law, etc. For example, *Reliance Finance Corp. v. Miller* (9th Cir. 1977) 557 F.2d 674, is cited for the concept that for purposes of applying the law of a rescission of a contract, the term "material" is interpreted more stringently where rescission is sought on the ground of mistake, as opposed to fraud or misrepresentation. In the context of granting a new trial, *Sherman v. Kinetic Concepts Inc.* (1998) 67 Cal.App.4th 1152, is cited for the concept that newly discovered evidence is deemed "material" if it is likely to produce a different result at a new trial.

This record does not require any extended comparisons of the use of the term "to materially change" in Business and Professions Code section 11012, to the usage of comparable terms, in all those other bodies of law. Instead, the relevant question should be which possible interpretation of the statutory language, as applied to these undisputed facts, best serves the evident purposes of the statute. (*Lungren*, *supra*, 14 Cal.4th 294, 305.)

Toward that end, it is important to note the nonexclusive nature of the regulation *("A material change in the subdivision . . . shall include, but shall not be limited to the following . . . .,"* for defining material changes. (Cal. Code Regs., tit. 10, § 2800; italics added.) The record confirms that cost consequences may well be important to an HOA either in gaining or losing common areas, and it makes sense to conclude that "deletion" of a common area could, in the abstract, readily qualify as a material change to a subdivision setup.

That does not answer the specific question before us, however. Here, the trial court had to determine whether this record supported a finding that material changes in this subdivision's setup were made, from the time of the initial public reports, through the time that the 2003 special disclosure was processed in full, and when escrow closed in 2004 on plaintiff's purchase. (Bus. & Prof. Code, § 11012.) We accordingly turn to the specific arguments about whether the 2003 special disclosure transactions amounted to "materially changing" the setup of this particular subdivision.

C. Analysis

Plaintiff reiterates that the protections of statutes enacted for public purposes cannot be waived or otherwise avoided by private parties. (Civ. Code, § 3513; see, e.g., *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815; 58 Cal.Jur.3d (2004) Statutes, § 164, pp. 592-593.) That proposition is sound in general, but it is not dispositive on this record. Here, throughout the planning and development process, the nature and use of the Lot 79 access easement was never changed. Although the original planning documents showed that the HOA would be the owner, other documents (special declarations and escrow instructions) included conflicting information about whether Lot 79 would be a common area regarding ownership, or only a maintenance area for the HOA. The record at the time of trial shows that Toll continued to be the owner, but it had provided for access to the affected parcels, and had provided for maintenance and irrigation by the owners of one of the affected parcels. Our reading of the statute does not support plaintiff's view that the SLA was intended to prevent this kind of individualized disclosure transactions regarding a particular property on a limited access issue. (See *Long Beach, supra*, 111 Cal.App.4th 302, 306.)

Also, even assuming this could have amounted to a "material change" in the setup of the subdivision, the "unlawfulness" language of Business and Professions Code section 11012 did not require the granting of rescission.[7] In *PJNR, supra,* 230 Cal.App.3d 1176,

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[7] Business and Professions Code section 11012 provides, "It is unlawful for the owner, his agent, or subdivider, of the project, after it is submitted to the Department of

1189, the court noted that equitable principles allow affirmative defenses to be raised in the context of SLA adjudications. In the case before us, plaintiff was notified of the evolving plans before his escrow closed, and he has not shown that any further disclosures of the plan to the DRE in particular would have changed anything about his knowledge, nor would it have been likely to make a significant difference in the DRE's processing of the subdivision. Toll had 70 lots in this area (out of the 500 total lots), and approximately three were affected by the special disclosure. The purposes of the statutory protections were served, that the affected parties as well as the public were given adequate notice of the nature of the access easement over the street lot.

The trial court had a sufficient basis to make findings that waiver and estoppel applied against any claims that plaintiff was harmed by this particular form of nondisclosure to the DRE. This record does not support plaintiff's contentions that the HOA was somehow excusing Toll for its past violations of the law. (See *PJNR, supra,* 230 Cal.App.3d 1176, 1188 ["The issue is whether the Association has the authority to excuse the developer for past violations of the law. The answer is 'no.' '[A] law established for a public reason cannot be contravened by a private agreement.' (Civ. Code, § 3513.)"].)

Using the materiality standard, even interpreting the undisputed facts to show that some aspects about the maintenance and use of the street lot were changed (even if the title was not), and therefore assuming that there was some technical noncompliance with

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Real Estate, *to materially change the setup* of such offering *without first notifying* the Department of Real Estate in writing of such intended change . . . ." (Italics added.)

the SLA requirements, plaintiff has still not shown any justification for rescission or damages arising from his purchase of the property under those circumstances. No "material" changes in the setup of the subdivision were made at the relevant times. Under the standards of Civil Code section 1689, subdivisions (b)(5) and (6), as applied in this statutory context, plaintiff has failed to show that any of the cited statutory violations were material to either the integrity of the planning process, or the decision to proceed with the purchase contract. Nor was the trial court required to conclude, on this record, that "the public interest will be prejudiced by permitting the contract to stand." (Civ. Code, § 1689, subd. (b)(6); see 1 Witkin, Summary of Cal. Law, *supra*, § 935, pp. 1029-1030.)

Further, plaintiff has not shown injury from any violation of a different regulation, California Code of Regulations, title 10, section 2792.15, subdivision (a), which requires any common areas and facilities that are to be transferred to a homeowners' association to be handled, directly or through a corporate trustee, before or at the time of purchase in the subdivision. Although plaintiff argues that Toll made insufficient disclosures to the DRE about deciding to retain ownership of Lot 79 and to create access easements over it, adequate disclosures were made to plaintiff, and the DRE did not have to be notified of transfers that did not happen.

Subdivision (b) of that same regulation, California Code of Regulations, title 10, section 2792.15, allows that a developer/subdivider may "create a contractual right in himself *or may reserve easements of limited duration, for common driveway purposes,* for drainage and encroachment purposes and for ingress to and egress from the common

areas for the purpose of completing improvements thereon or for the performance of necessary repair work . . . ." Our record only goes up until the time of trial, and does not show that the duration of the street lot easement violated these regulations. Plaintiff's objections on these points fail because the trial court appropriately found that under all the circumstances, the disclosure purposes of the SLA were adequately satisfied by the preparation of the special disclosure. Plaintiff has not shown that estoppel and waiver were improperly applied to bar his claims.

III

CONTENTIONS RELATING TO SMA

The principal goals of the SMA are "to encourage orderly community development, to prevent undue burdens on the public, and to protect individual real estate buyers. [Citations.]" (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 563-564.) Under the SMA, the sale of real property for which a parcel map is required may not occur until such a parcel map is recorded in compliance with the SMA and any applicable local ordinance. (*Black Hills v. Albertson's* (2007) 146 Cal.App.4th 883, 890-891 (*Black Hills*).)

The remedies for a violation of the provisions of the SMA include, as relied upon here, section 66499.32, subdivision (a), providing to a buyer of real property the right to void, at the "sole option" of that person, "[a]ny . . . contract to sell real property which has been divided, or which has resulted from a division, in violation of the provisions of [the SMA]." " 'A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the

contract . . . .' [Citation.]" (*Le Gault, supra,* 70 Cal.App.4th at p. 374.) Such a remedy is allowed where a particular transaction is found to violate the statutory purposes and objectives. (See *Long Beach, supra,* 111 Cal.App.4th 302, 306.)

There are limits to the rescission remedy set forth in Government Code section 66499.32, subdivision (b), which states that "[t]he provisions of this section shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final map or parcel map, from and after the date of recording." (*Black Hills, supra,* 146 Cal.App.4th at p. 892.) A recorded parcel map constitutes a certificate of compliance. (Gov. Code, § 66499.35, subd. (d).)

Plaintiff contends that he, as a buyer, has the right to avoid his contract for the sale of real property that was divided in violation of the SMA, even though his objections pertain to Lot 79, the access easement for his parcel. (Gov. Code, § 66499.32, subd. (a).) There is some doubt whether he falls within the class of persons sought to be protected by the SMA, since its remedies are mainly restricted to those that would affect the same parcel that the plaintiff actually bought. (See *Le Gault, supra,* 70 Cal.App.4th at pp. 373-374 [discussing standing]; *Black Hills, supra,* 146 Cal.App.4th at pp. 890-892; *Long Beach, supra,* 111 Cal.App.4th 302, 306.) Here, plaintiff complains about the adjacent parcel. However, this case was not decided upon technical standing issues, and we will address his SMA contentions on the merits.

Plaintiff argues that since the original plans called for the HOA to own Lot 79, pursuant to condition SCZR of the tentative map (approved in the 2002 final map), Toll violated the SMA when it retained ownership or when it allowed the Lot 59 owners to

assume duties to irrigate and maintain the street easement. The 2002 final map does not show Toll's ownership of Lot 79, and the 2003 special disclosure and the 2004 special declaration show differing plans for Lot 79. In its respondent's brief, and as discussed above, Toll admits that the planning documents and escrow instructions contain conflicting designations about Lot 79. However, plaintiff fully participated in the 2003 special disclosure process about these very issues, before escrow closed on his property.

Under Government Code section 66468, "[t]he filing for record of a final or parcel map by the county recorder shall automatically and finally determine the validity of such map and when recorded shall impart constructive notice thereof." Plaintiff contends that the provisions of Government Code section 66469 clearly required that such a final map be amended, under these circumstances, and he particularly points to its subdivision (g). We accordingly look to the text of that section to apply it to these circumstances.

Government Code section 66469 provides: "After a final map or parcel map is filed in the office of the county recorder, *it may be amended* by a certificate of correction or an amending map *for any of the following purposes*: [¶] (a) To correct an error in any course or distance shown thereon. [¶] (b) To show any course or distance that was omitted therefrom. [¶] (c) To correct an error in the description of the real property shown on the map. [¶] (d) To indicate monuments set after the death, disability, retirement from practice, or replacement of the engineer or surveyor charged with responsibilities for setting monuments. [¶] (e) To show the proper location or character of any monument which has been changed in location or character originally was shown at the wrong location or incorrectly as to its character. [¶] (f) To correct any additional

information filed or recorded pursuant to Section 66434.2, if the correction does not impose any additional burden on the present fee owners of the real property and does not alter any right, title, or interest in the real property reflected on the recorded map. [¶] (g) *To correct any other type of map error or omission as approved by the county surveyor or city engineer that does not affect any property right, including, but not limited to, lot numbers, acreage, street names, and identification of adjacent record maps*. [¶] As used in this section, 'error' does not include changes in courses or distances from which an error is not ascertainable from the data shown on the final or parcel map." (Gov. Code, § 66469, italics added.)

None of these types of corrections clearly corresponds to the problems that arose concerning the street lot and the irrigation and maintenance problems that were being dealt with in the subdivision. Even though a final map "may" be amended to promote accuracy under the above circumstances, that procedure is not made mandatory by the statutory scheme. (Gov. Code, §§ 66468, 66469; see *Morris, supra,* 18 Cal.3d pp. 908-910.) We think that plaintiff has failed to show why this type of amendment should have been required in order to notify the City authorities or the public about how the street lot problems were being handled over the relevant time periods. Plaintiff's own participation in the special disclosure process was properly evaluated by the trial court as justifying a finding that he was estopped from raising these objections.

Further, plaintiff's requested relief included declaratory relief that Toll must immediately convey the street lot to the HOA. Plaintiff fears that there may be a merger of title between Lot 79 and Lot 59, in case the Lot 59 owners ever take title. However,

the record does not indicate that this change in title has ever happened, and we cannot address this theory prospectively. The trial court did not err in ruling against plaintiff on the SMA claims.

IV

CONTENTIONS RELATING TO CC&RS; UCL

Plaintiff's remaining claims relate to alleged violations of the CC&Rs, occurring in the same manner as the arguable statutory violations. He relies on the CC&Rs' provisions that required timely transfer of common areas from the developer to the HOA. He also cites to Toll's entry into covenants with the City, as part of the planning process for the original tentative map, such as compliance with the terms and conditions of the permit and other stated easements (for golf balls, recreation, etc.).

Toll and the HOA presented evidence to the trial court that the special disclosure process was entered into to promote the interests of the HOA, as well as all the neighboring landowners, by providing for maintenance and irrigation of the street lot, that had not otherwise been planned. On this record, the trial court could reasonably find that the procedures the HOA followed, together with Toll, were not in breach of the CC&Rs provisions relied upon, but instead were appropriate under the circumstances. (See *Bodily, supra*, 104 Cal.App.3d 348, 355-357 [regarding the HOA's duties to provide for maintenance of the common areas].) Plaintiff has provided no legal or factual support for his allegations of violations of the CC&Rs. His statutory claims raise concerns that are significant only in the abstract, and on this record, they have no merit. Accordingly, we

cannot find that the trial court erred in determining that there was no separate basis for those claims.

Plaintiff's additional claims likewise fail, that these same "unlawful" activities amounted to violations of the UCL. We have found no actionable violations of statutory protections that would serve as predicate unlawful acts for purposes of the UCL. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949-950.) The judgment must be affirmed.

DISPOSITION

Judgment affirmed; appellant to pay all costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.